Supreme Court, U.S.
FILED
JAN 7 1998
CLERK

(2)

No. 97-777

# In the Supreme Court of the United States

OCTOBER TERM, 1997

WEBCOR PACKAGING, INC., PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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## QUESTION PRESENTED

Whether substantial evidence supports the National Labor Relations Board's finding that petitioner violated Section 8(a)(2) of the National Labor Relations Act, 29 U.S.C. 158(a)(2), by dominating and interfering with the formation and administration of a labor organization and contributing financial and other support to it.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 118 F.3d 1115. The decision and order of the National Labor Relations Board (Pet. App. 19a-33a) and the decision of the administrative law judge (Pet. App. 34a-53a) are reported at 319 N.L.R.B. 1203.

### JURISDICTION

The judgment of the court of appeals was entered on July 11, 1997. The time for filing a petition for a writ of certiorari was extended to and including November 8, 1997, and the petition was filed on November 7, 1997.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner is a manufacturer of corrugated boxes in Burton, Michigan. Pet. App. 35a. In 1991, petitioner's vice president for operations, Robert Sibilsky, decided to establish an organization through which employees could recommend changes in their working conditions. *Id.* at 21a. By memorandum dated February 11, 1991, Sibilsky directed the formation of a Plant Council, with five members to be elected by the hourly work force. *Id.* at 24a, 39a. The memorandum further stated that the Plant Council "will function as a policy development body . . . involved with the development of plant policies, the employee handbooks, the creation of a grievance procedure that will involve council member representation, and with the process of hourly compensation and benefits." *Id.* at 24a.

On February 13, 1991, petitioner posted a memorandum to all employees announcing the establishment of the Plant Council, describing its goals, and detailing the election process. Pet. App. 24a, 40a. On February 22, 1991, petitioner held the election for the employee members of the Plant Council. Of the 28 ballots cast, 18 were blank. Also, four of the five employees elected refused to serve on the Plant Council. Sibilsky thereafter ordered a temporary halt to the Plant Council's establishment. *Id.* at 2a.

In the meantime, on February 19, 1991, the Union (Local 332, International Brotherhood of Teamsters, AFL-CIO) filed a petition with a regional office of the National Labor Relations Board (the Board) to represent a unit of petitioner's employees. Pet. App. 2a, 35a

n.1, 38a-39a. During the ensuing election campaign, petitioner urged employees to vote against the Union, and emphasized the benefits to be provided by the Plant Council. *Id.* at 2a-3a. Petitioner also claimed that it had already implemented the Plant Council in response to employee concerns. *Id.* at 2a-3a & n.1, 30a, 41a. On April 18, 1991, the employees voted against unionization by a vote of 21 to 14. *Id.* at 3a, 41a.

Two weeks later, petitioner again conducted an election for the employee members of the Plant Council. Pet. App. 3a. As before, petitioner provided the ballots and the polling place, and held the election during working hours. *Id.* at 41a. This time, employees were asked to volunteer to serve on the Plant Council and the ballots named only the volunteers. *Id.* at 3a, 41a. Five employees were elected and they, together with three management members named by petitioner, comprised the Plant Council. *Id.* at 3a. Meetings of the Plant Council began in May 1991 and continued thereafter. *Id.* at 41a. The meetings were held in the plant during working hours and were scheduled by petitioner's plant manager, subject to change at the request of a member. *Id.* at 3a, 45a-46a. Petitioner supplied the needed materials and equipment, and paid for the time that members devoted to the Plant Council. *Id.* at 3a, 46a.

In practice, the Plant Council decided issues by consensus, rather than majority vote. Pet. App. 3a, 42a. Employees who were not members of the Plant Council raised issues by putting suggestions in a box designated for that purpose. Those who made suggestions were routinely invited to Plant Council meetings to present their proposals orally. *Id.* at 3a, 42a-43a. Petitioner placed matters before the Plant Coun-

cil by having one of the management members raise the issue at a Plant Council meeting. *Id.* at 42a-43a.

The Plant Council was authorized to consider all matters concerning wages, hours, benefits, and work rules. Pet. App. 3a, 27a, 43a. In considering such issues, the Plant Council canvassed employees for their opinions concerning contemplated policy changes. *Id.* at 23a n.6, 44a-45a. Among the issues the Plant Council considered were petitioner's purchase of employee tools and safety boots, fair distribution of overtime, new attendance rules, and petitioner's policy on vacation paychecks. *Id.* at 10a n.6, 21a-22a, 44a-45a. The Plant Council proposed changes regarding those issues, and petitioner implemented the proposed changes except for the one pertaining to vacation paychecks. *Id.* at 21a-22a & nn.3-4, 44a.

2. On April 25 and May 17, 1991, the Union filed unfair labor practice charges against petitioner. Pet. App. 35a n.1. The Union alleged that the Plant Council is a labor organization under Section 2(5) of the National Labor Relations Act, which defines a labor organization to include "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." 29 U.S.C. 152(5). The Union further alleged that petitioner dominated or interfered with the Plant Council's formation or administration, and contributed financial or other support to it, in

violation of Section 8(a)(2) of the Act, 29 U.S.C. 158(a)(2).[1]

Following a consolidated hearing, an administrative law judge (ALJ) concluded that the Plant Council is a "labor organization" under Section 2(5) of the Act. Pet. App. 46a-48a. The ALJ found that the Plant Council is an organization in which employees participate; that the Plant Council deals with petitioner concerning grievances and the terms and conditions of work; and that the employee members of the Plant Council represent petitioner's employees. *Ibid.* Because petitioner dominated and interfered in the Plant Council's formation and administration, and contributed financial support to it, the ALJ further concluded that petitioner violated Section 8(a)(2) of the Act. *Id.* at 48a-49a.

3. The Board affirmed the ALJ's findings. Pet. App. 19a-33a. The Board first concluded that the Plant Council meets the statutory criteria of a labor organization under Section 2(5). *Id.* at 20a-23a. The Board reasoned that petitioner designed the Plant Council to "deal[] with" petitioner concerning employee grievances, and terms and conditions of work. *Id.* at 21a. The Board relied on Sibilsky's testimony that he formed the Plant Council to offer recommendations to petitioner about proposed changes in working conditions that petitioner either would accept or reject, and on the fact that the Plant Council functioned as intended. *Id.* at 21a-23a.

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[1] Section 8(a)(2) makes it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." 29 U.S.C. 158(a)(2).

The Board also found that "the Plant Council acted in a representational capacity because its employee-members were elected by [petitioner's] work force." Pet. App. 23a n.6. The Board further explained that "the Plant Council canvassed employees for their opinion regarding policy changes the Plant Council was considering," and otherwise sought to ascertain employee sentiment on issues before the Council. *Ibid.* Because it found that the Plant Council represented petitioner's employees, the Board found it "unnecessary * * * to determine whether an employee group could be found to constitute a labor organization absent a finding that it acted as a representative of other employees." *Ibid.*

The Board further agreed with the ALJ that petitioner violated Section 8(a)(2) by dominating the formation and administration of the Plant Council. Pet. App. 24a-26a. The Board explained that petitioner determined the structure and administration of the Plant Council, and brought about its creation, abatement, and reestablishment. *Ibid.* Finally, the Board adopted the ALJ's recommended order setting aside the April 18, 1991 representation election and directing petitioner to disestablish the Plant Council. *Id.* at 28a-31a.

4. The court of appeals affirmed. Pet. App. 1a-18a. The court rejected petitioner's contention that the Plant Council is not a labor organization under Section 2(5) because the Council does not represent other employees. The court declined to address whether employee representation is a necessary element of a labor organization under Section 2(5). *Id.* at 8a. Instead, the court held that "there is ample evidence supporting the ALJ's finding that the Council oper-

ated at least in part as a representative body, rather than a brainstorming group." *Id.* at 9a.

The court also found that the Plant Council has been "dealing with" petitioner within the meaning of Section 2(5) of the Act. Pet. App. 9a-11a. The court explained that the Board has defined "dealing with" as "ordinarily entail[ing] a pattern or practice in which a group of employees, over time, makes proposals to management, management responds to these proposals by acceptance or rejection by word or deed, and compromise is not required." *Id.* at 9a (quoting *E.I. du Pont de Nemours & Co.*, 311 N.L.R.B. 893, 894 (1993)). Observing that the Board's definition of "dealing with" is reasonable and not challenged by petitioner, the court held that "the ALJ's findings make it plain that the Council was created to, and did, deal with the employer." *Id.* at 10a. The court also rejected petitioner's argument that the Council is not a labor organization because petitioner did not form the Council "out of hostility towards the union." *Id.* at 11a. The court concluded that "bad faith is not a prerequisite to a finding that a company-sponsored group is a labor organization." *Id.* at 12a.[2]

**ARGUMENT**

1. a. Petitioner renews (Pet. 10-11) its contention that the Plant Council did not represent petitioner's employees. That fact-bound question does not warrant this Court's review. See *NLRB* v. *Hendricks County Rural Elec. Corp.*, 454 U.S. 170, 176 n.8

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[2] The court of appeals also held that it had no jurisdiction to hear petitioner's challenge to the Board's remedy ordering that the April 18, 1991 representation election be set aside and that a new election be held. Pet. App. 17a. Petitioner does not challenge that holding in this Court.

(1981); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

In any event, the court of appeals correctly concluded that substantial evidence supports the Board's finding that the Plant Council represented petitioner's employees. As the court below found, the ALJ reasonably concluded that the elected status of the Council's employee members "showed that they served at least in part as representatives," because generally "people vote for particular delegates because they hope that the person they elect will represent their views." Pet. App. 8a. Contrary to petitioner's assertion (Pet. 10), the Board's finding of representational status rested on other evidence as well. The court of appeals explained that a proposed new attendance policy had been circulated to all employees with instruction that they "respond back to the Plant Council" and, therefore, the Board could "infer[] that the Council was meant to represent those employees who did respond." Pet. App. 8a. The court further pointed to evidence from the minutes of Plant Council meetings suggesting "that the worker-members served to represent the whole class of employees." *Ibid.*[3]

b. Petitioner also contends (Pet. 8-11) that review by this Court is needed to resolve the question whether an employee group must act in a representative capacity in order to be a labor organization under

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[3] The court of appeals also reasoned that the fact that employees initially made written suggestions to the Council supported the Board's conclusion that employee members would represent their co-workers (Pet. App. 8a), and that, "if the Council was meant to get input from lots of individual employee members, it is hard to see why members were elected for such long (one-year) terms" (*id.* at 9a).

Section 2(5) of the Act. The court of appeals, however, did not reach that issue, because it found, like the Board, that the Plant Council operated in a representative capacity. Pet. App. 8a-9a, 23a n.6. Accordingly, the decision below does not present the question whether representative status is a prerequisite for a labor organization under Section 2(5).

2. Petitioner further argues (Pet. 12-15) that the Board has given the term "dealing with" under Section 2(5) an unreasonable interpretation. That claim lacks merit.

In *NLRB* v. *Cabot Carbon Co.*, 360 U.S. 203 (1959), this Court held that "Congress, by adopting the broad term 'dealing' and rejecting the more limited term 'bargaining collectively,' did not intend that the broad term 'dealing with' should be limited to and mean only 'bargaining with.'" *Id.* at 211. The Board subsequently has explained that "dealing with" contemplates a "bilateral mechanism" that "ordinarily entails a pattern or practice in which a group of employees, over time, makes proposals to management," concerning the subjects listed in Section 2(5), and management responds to those proposals "by acceptance or rejection by word or deed." Pet. App. 21a (citing *Electromation, Inc.*, 309 N.L.R.B. 990, 995 n.21 (1992), enforced, 35 F.3d 1148 (7th Cir. 1994)).

Petitioner asserts (Pet. 13) that the Board's definition makes it impossible for "employee involvement programs [to] exist in this country." That is not correct. Employers are free to communicate with their employees through means other than unlawfully dominating and assisting their labor organizations. Indeed, the Board has emphasized that:

> [I]f there are only isolated instances in which the group makes ad hoc proposals to management followed by a management response of acceptance or rejection by word or deed, the element of dealing is missing.
>
> . . .
>
> [I]f the committee exists for the purpose of sharing information with the employer, the committee would not ordinarily be a labor organization. That is, if the committee makes no proposals to the employer, and the employer simply gathers the information and does what it wishes with such information, the element of dealing is missing, and the committee would not be a labor organization.

Pet. App. 9a-10a (quoting *E.I. du Pont de Nemours & Co.*, 311 N.L.R.B. at 894); see also *Electromation, Inc.* v. *NLRB*, 35 F.3d 1148, 1157 (7th Cir. 1994) (noting "the lawful use of legitimate employee participation organizations, especially those which are independent, which do not function in a representational capacity, and which focus solely on increasing company productivity, efficiency, and quality control, in appropriate settings"). The court of appeals therefore correctly concluded that it should defer to the Board's reasonable interpretation of the term "dealing with." Pet. App. 9a-10a; see also *Marine Engineers Beneficial Ass'n* v. *Interlake Steamship Co.*, 370 U.S. 173, 180-181 (1962) (recognizing deference owed to NLRB in defining meaning of a labor organization under Section 2(5)).

In the present case, the Board specifically found that the Plant Council is not "merely a means of com-

munication between management and employees in which ad hoc proposals were made and in which management might glean some ideas and even adopt them." Pet. App. 27a. Nor, contrary to petitioner's suggestion (Pet. 13-15), is the Plant Council a committee formed simply to discuss such issues as safety, employee productivity, and plant efficiency. Pet. App. 27a.[4] As the court of appeals explained, the Council "made several specific suggestions to the company" regarding terms and conditions of employment, and "the company responded by voluntarily adopting at least four of these." *Id.* at 10a. The court of appeals thus correctly concluded that "[t]his is a paradigm case of dealing." *Ibid.*

3. Petitioner finally argues (Pet. 15-17) that an employer may not be found to dominate or interfere with a labor organization unless the employer's actions are motivated by an intent to discourage employees from organizing for purposes of collective bargaining. The court of appeals properly rejected that contention. Pet. App. 12a. Nothing in the text of Section 2(5) or Section 8(a)(2) of the Act supports the view that the employer must be motivated by anti-union sentiment. Moreover, this Court in *NLRB* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U.S. 241, 248, 251 (1939), held that the Board could conclude that an employer unlawfully dominated and interfered with an employee committee, notwithstanding the employer's "good motives" or the fact that the employer did not attempt to interfere with

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[4] The Board explained that petitioner had created a separate Employment Involvement Steering Committee, which was not challenged by the Union, "to address issues of productivity, quality, and safety." Pet. App. 27a.

union activities. Accordingly, the court of appeals correctly held (Pet. App. 12a) that an employer's improper motive is not a requirement for finding unlawful domination or interference under the Act.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1998